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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1972

No.

ALFRED WILSON, *et al.*,

Plaintiff, Respondent,

v.

NOOTER CORPORATION,

Defendant and Third-Party Plaintiff, Petitioner,

v.

THE H. K. FERGUSON COMPANY

Third-Party Defendant, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nooter Corporation, the petitioner herein, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the First Circuit entered in the above-entitled case on March 13, 1973 to the extent that said order denies the petitioner its right to have

liability and damage issues in this case tried before a twelve-man jury.

OPINION BELOW

The Court of Appeals for the First Circuit filed its opinion in this case on March 13, 1973. This opinion has not yet been officially reported. A copy appears in the Appendix of this petition. In the said opinion the Court of Appeals held that the petitioner is entitled to a new trial because the District Court for the District of New Hampshire erred in directing verdicts against the petitioner. However, the Court of Appeals also held that the District Court acted within its authority when it conducted the original trial before a six-man jury in accordance with its local rule. As a result, although the Court of Appeals ordered a new trial on issues of liability, it authorized the District Court to conduct the new trial before a six-man jury and it refused to allow the petitioner a new trial on the issue of damages.

JURISDICTION

The Court of Appeals for the First Circuit, by its order of March 13, 1973, vacated judgments rendered against the petitioner in the District Court for the District of New Hampshire and ruled that the District Court should retry liability issues. In the opinion which it filed with its order, the Court of Appeals authorized the District Court to conduct the new trial before a six-man jury in accordance with the District Court's local rule. After this order and opinion had issued from the Court of Appeals, the petitioner filed a motion asking the Court to stay its mandate in this case pending the filing of this petition for a writ of certiorari. The motion was denied. The

petitioner then filed a motion in the District Court for a stay of proceedings for the same reason. The District Court denied this motion. Nooter is now applying to this Court for a stay pending review on certiorari.

This jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTION PRESENTED

May the New Hampshire District Cpurt by its local rule restrict the size of the trial jury in a diversity case to six persons, despite Seventh Amendment guarantees, statutory restrictions on the court's rule-making power, and New Hampshire's constitutional guarantee of a twelve-man jury?

This broad question is partially before this Court in the pending case of *Colgrove v. Battin*, 456 F.2d 1379 (9th Cir. 1972), *cert. granted* Oct. 10, 1972, 41 U.S.L.W. 3166. However, the instant case raises a fresh issue because of the conflict between the District Court's local rule and the New Hampshire constitutional guarantee of a twelve-man jury.

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES, AND RULES INVOLVED

The constitutional provisions involved in this case are the Seventh Amendment of the Constitution of the United States and Part I, Article 20 of the Constitution of New Hampshire, both of which guarantee the petitioner the right to a trial by a twelve-man common law jury. Also involved are 28 U.S.C. §§2071 and 2072, the federal statutes defining the rule-making authority of the federal courts, as well as Rules 38(a), 48 and 83 of the Federal Rules of Civil Procedure. These constitutional

provisions, statutes and rules conflict with Local Rule 30 of the District Court for the District of New Hampshire which restricts the size of the civil jury to six persons. All of the provisions mentioned above are printed in the Appendix hereto.

STATEMENT OF THE CASE

The petitioner Nooter Corporation (herein Nooter) was a subcontractor on a New Hampshire construction project. A workman (Wilson) brought a negligence action against Nooter for personal injuries which he sustained on the construction site. The accident resulting in Wilson's injuries was allegedly caused by the negligence of certain Nooter employees, including an alleged "borrowed servant" who was the operator of a crane owned by the general contractor but engaged at the time of the accident in performing a task for Nooter. After being sued by Wilson, Nooter brought a third-party complaint against the general contractor, The Ferguson Company (herein Ferguson), for indemnity on the theory that the plaintiff's injuries were caused by Ferguson's failure to operate the crane in a careful and workmanlike manner. Under New Hampshire law, the liability of Nooter to Wilson, the obligation of Ferguson to indemnify Nooter, and the amount of Wilson's damages, present questions for the jury.

Prior to trial the District Court informed counsel that it intended to impanel a six-man jury in accordance with its local rule. Counsel for Nooter and for Ferguson both objected, but the Court proceeded to impanel a six-man jury. At the conclusion of the evidence the Court directed verdicts on liability issues in favor of the plaintiff Wilson against Nooter, and in favor of the third-party defendant Ferguson against Nooter. The six-man jury determined damages.

Nooter appealed the case to the First Circuit on the ground that the evidence would not support the directed verdicts in favor of the plaintiff Wilson and the third-party defendant Ferguson. Nooter also appealed on the ground that the District Court had erred in trying the case over Nooter's objection to a six-man jury in accordance with the court's local rule. On this issue Nooter's position on appeal was that the District Court's enforcement of its six-man jury rule infringed Nooter's Seventh Amendment right to a jury trial, exceeded the District Court's rule-making authority, and denied Nooter the right to a twelve-man jury to which it was entitled under New Hampshire law and under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

By its order and opinion of March 13, 1973 the First Circuit ruled that the District Court had erred in directing verdicts against Nooter and in favor of the plaintiff Wilson and the third-party defendant Ferguson. However, the court upheld the use of the six-man jury at trial. As a result, the court allowed the damage award set by the jury at the initial trial to stand, and it remanded the case for a new trial on liability issues only before a six-man jury. Following this decision by the Court of Appeals, Nooter petitioned the court to stay its mandate and it also petitioned the District Court to stay proceedings pending the filing of this petition for a writ of certiorari and action hereon by this Court. Both the Court of Appeals and the District Court refused to grant the stays requested by Nooter. Nooter is presently applying to this Court for a stay pending action by this Court on this petition.

REASONS FOR GRANTING THE WRIT

The question of the validity of the local rules by which federal district courts provide for civil trials before six-man juries is presently being considered by this Court. *Colgrove v. Battin, supra.* The *Colgrove* case squarely presents the question whether the Seventh Amendment is satisfied by a six-man jury. It also squarely presents the question whether the rule-making authority of the district courts is sufficiently broad to allow them to innovate by cutting the size of the civil jury from twelve persons to six. Nooter's position is that the answer to each of these questions is "no". To advise this Court of its views on these issues and to protect its right to trial before a twelve-man jury, Nooter filed a Motion to appear as *amicus curiae* in the *Colgove* case. The motion was granted, and Nooter's *amicus* brief is on file with this Court.

The instant case of *Wilson v. Nooter Corporation* presents at least one important new question not at issue in *Colgrove v. Battin.* This question is raised by the fact that the six-man jury provided by the local rule of the New Hampshire District Court deprives Nooter of the right to a trial before a twelve-man jury, which right is guaranteed to Nooter under long-established principles of New Hampshire constitutional law. The new issue, then, is whether the District Court can eliminate this important state constitutional right without violating the doctrine of *Erie Railroad Co. v. Tompkins, supra,* which requires federal courts in diversity cases to apply state rules of substantive law. This is surely an important question and it is clearly presented by the instant case. Moreover, it is a problem which no doubt exists in other federal districts where state constitutional law requires a twelve-man jury, but local federal rules provide only a six-man jury.

Accordingly, Nooter requests that this writ be granted for the following reasons. First, Nooter has done everything which could reasonably be expected of it in order to preserve its right to a trial before a twelve-man jury. It has appealed the issue to the First Circuit Court of Appeals, filed an *amicus* brief in this Court in the *Colgrove* case, and, when it lost on the six-man jury issue in the Court of Appeals, Nooter filed motions for stays in the Court of Appeals, in the District Court and in this Court so that it could seek relief in this Court. If this Court now denies this petition and if proceedings continue to judgment in the District Court prior to this Court's decision in *Colgrove v. Battin*, then, despite all of Nooter's efforts to date, its rights and respect to the jury trial issue will have been lost, even if this Court ultimately holds in *Colgrove* that a twelve-man jury is required. This highly unjust result would be obviated if this Court stays proceedings in the District Court, grants this petition for a writ of certiorari and decides this case together with the case of *Colgrove v. Battin* presently pending before it. The second reason why this petition should be granted is that the instant case presents an important new question because of the conflict between the local rule of the District Court and constitutional rights under New Hampshire law. This question is not now before this Court but should be resolved by it.

To support the position it is taking, Nooter submits the following Argument.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' DECISION UPHOLDING A LOCAL DISTRICT COURT RULE WHICH, BY LIMITING THE SIZE OF CIVIL JURIES TO SIX PERSONS, FAILS TO PRESERVE THE COMMON LAW JURY REQUIRED BY THE SEVENTH AMENDMENT, EXCEEDS THE RULE-MAKING AUTHORITY OF THE DISTRICT COURTS, AND DENIES NOOTER SUBSTANTIVE RIGHTS TO WHICH IT IS ENTITLED UNDER THE DOCTRINE OF *ERIE RAILROAD CO. V. TOMPKINS.*

A. In Suits at Common Law the Seventh Amendment Requires that the District Courts Preserve the Right to Trial by a Twelve-Man Common Law Jury.

Until the recent decision of this Court in *Williams v. Florida*, 399 U.S. 78 (1970) it was considered a settled constitutional rule that a jury trial in civil or criminal proceedings in the federal courts required a jury as known at common law, that is, a jury of twelve persons whose unanimous action is necessary for a verdict or conviction. *E.g. Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *American Publishing Company v. Fisher*, 166 U.S. 464 (1897); *Thompson v. Utah*, 170 U.S. 343 (1898). However, in *Williams, supra*, this Court upheld a conviction obtained by the State of Florida before a jury of six persons who were impaneled pursuant to a Florida statute providing for such juries in all but capital cases. The Court in *Williams* held that the "impartial jury" guaranteed by the Sixth Amendment "in all criminal prosecutions", and the right to a jury trial in criminal cases provided by Article III of the Constitution, do not require a twelve person panel.

In apparent reliance on the assumption that *Williams* can and should be extrapolated to cover civil as well as criminal juries, many federal district courts have enacted local rules limiting the size of civil jury panels to six persons. This case concerns such a rule which was adopted by the Federal District Court for the District of New Hampshire. The rule provides:

> Rule 30. Impaneling Trial Jury
> (a) Number of Jurors and Initial Selection
> (1) In all civil jury cases, the jury shall consist of six members and the clerk shall select by lot the names of six persons to be drawn initially. (2) In all criminal jury cases, the jury shall consist of twelve members . . . .

By providing for six-man civil juries, the district courts have plainly misread the *Williams* case and miscalculated the extent to which that case changed the old rule insofar as civil juries and the Seventh Amendment are concerned. In point of fact, at footnote 30 of its opinion in *Williams*, this Court expressly stated:

> While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the "common law" that occur in the Seventh Amendment might support a different interpretation. 399 U.S. at 92.

The *Williams* case should not, then, be taken as authorization for the use of six-man juries in civil cases. However, the Court of Appeals ruled in its opinion in the instant case that *Williams* indicates that the Constitution will sanction a six-man civil jury. The court's conclusion is based on the assumption that the use of the language "'at common law' in the Seventh Amendment merely

distinguishes common law from equity and admiralty cases for purposes of the jury trial requirement, and does not imply a requirement that jurors number twelve". *Wilson v. Nooter*, ____ F.2d. ____, decided March 13, 1973, Advance Sheet p. 9, reproduced in Appendix at p. 9a, *infra*. Certainly nothing in the *Williams* decision provides any authority for this proposition. In fact, if anything, *Williams* indicates that the Seventh Amendment requires a twelve-man jury. This is so because in deciding the Sixth Amendment issue presented by *Williams*, this Court relied upon the *absence* of any reference in that Amendment to the "common law" or to other "accustomed requisites". 399 U.S. at 97. Since it was the absence of such references in the Sixth Amendment which led this Court to conclude that it does not require a common law jury, where such references do appear it is only proper that they be taken seriously. Accordingly, the Court of Appeals erred when it held that, in spite of the Seventh Amendment's twin reference to the "common law", the Seventh Amendment does not require the "common law" twelve-man jury.

Furthermore, the Court of Appeals erred by failing to recognize that the fundamental purpose of the *Williams* decision was to harmonize the requirements of the Sixth Amendment with state practice. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court ruled that Sixth Amendment jury standards are incorporated in the Fourteenth Amendment and therefore are binding upon the states. By ruling in *Williams* that the peculiar language of the Sixth Amendment does not require a twelve-man jury, the Court was able to uphold the Florida practice of trying lesser crimes before six-man juries. Since the chief purpose of the *Williams* case was to accommodate federal requirements with state practice, the Court of Appeals

should not have relied on this case as authority for its novel interpretation of the Seventh Amendment which serves to frustrate and nullify rights guaranteed by the New Hampshire Constitution.

B. The Right to a Jury Trial Is a Substantive Right and There Is a Substantive Difference Between a Trial Before a Panel of Six and a Panel of Twelve.

A host of decisions by this Court, involving a variety of different factual situations and legal issues, makes it perfectly plain that the right to a jury trial is a fundamental and substantial right which will be zealously protected by this Court's policy favoring jury trials. See, *e.g., Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958); *Beacon Stores, Inc. v. Westover*, 359 U.S. 500 (1959); *Simler v. Conner*, 372 U.S. 221 (1963); *Duncan v. Louisiana*, 391 U.S. 145 (1968). If the right to a jury trial is so important, it logically follows that the right is lost if a trial is held before some fact finder qualitatively different from the traditional jury. In *Williams*, the Court indicated that in order to fulfill the qualitative requirements for the Sixth Amendment jury, the number of jurors would have to be large enough "to promote group deliberation, free from outside attempts of intimidation, and to provide a fair possibility for obtaining a representative cross section of the community". 399 U.S. at 100. The Court's decision that the six man jury was adequate for Sixth Amendment purposes rested in part on its conclusion that six persons could perform these functions as well as twelve, that "there is no discernible difference between the results reached by the two different-sized juries". 399 U.S. at 101.

In the period since *Williams* various commentators have examined the authorities and "experiments" which this Court cited in holding that changing the size of the jury does not make a "discernible difference" in jury performance. See footnote 48 of the Court's opinion in *Williams*. The examinations have revealed that none of the authorities upon which the Court relied in *Williams* constitute a serious empirical study of the consequences of changing the size of the jury. In fact, the authorities amounted to little more than the summary impressions of selected and possibly biased observors. Because these authorities constitute an inadequate basis for making fundamental changes in the jury, the question of jury size has recently been subjected to more critical statistical analysis. The results are striking. The size of the jury does significantly affect its performance. See Ziesel, And Then There Were None: The Diminution of the Federal Jury, 38 Chi. L. Rev. 710, 713-15 (1971); Zeisel, The Waning of the American Jury, 58 A.B. A.J. 367 (1972); Note, The Effect of Jury Size on the Probability of Conviction, 22 Case W. Res. L. Rev. 529, 535-36 (1971).

In reaching its decision in the instant case the Court of Appeals failed to take into account this new learning on the relationship between jury size and jury performance. Instead it simply reiterated *Williams*, saying that there is "no discernible difference between the results reached by the different sized juries". *Wilson v. Nooter, infra*, Appendix at 10a. As a result, the erroneous assumption upon which *Williams* was founded served as one of the bases for the Court of Appeals' decision denying Nooter its right to trial before a twelve-man jury. This Court should grant certiorari to review its previous conclusion that jury size makes "no discernible difference" and, if it finds this conclusion erroneous, to protect Nooter from a

wrongful invasion of its rights improperly justified by this erroneous conclusion.

C. The District Court Had No Authority To Promulgate a Local Rule Eliminating the Defendant's Right to a Trial Before a Jury of Twelve Persons.

Under the authority of Article 1, Section 8 of the Constitution the Congress has authorized the district courts to "prescribe rules for the conduct of their business", but has required that such local rules be consistent with Acts of Congress and the rules of practice and procedure prescribed by the Supreme Court. 28 U.S.C. § 2071. The Congress has also conferred upon the Supreme Court somewhat broader authority to prescribe general rules of "practice and procedure". 28 U.S.C. § 2072, known as the "Enabling Act". Under this Act the Supreme Court promulgated the Federal Rules of Civil Procedure. One of these rules, namely Rule 83, specifically limits the rule-making authority of the district courts by prohibiting them from making rules "inconsistent with" the Federal Rules adopted by the Supreme Court.

The language of the Enabling Act imposes significant restrictions on the extent of the Supreme Court's rule-making power, since its initial paragraph only authorizes rules regulating "practice and procedure" and since its second paragraph further provides that rules promulgated by the Court "shall not abridge, enlarge, or modify any substantive right" and "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment of the Constitution". These restrictions serve to prohibit the Supreme Court from accomplishing a major substantive change in the size of the common law jury by mere Court rule. Surely the federal

district courts do not have any greater rule-making power under their more restricted grant of authority to "prescribe rules for the conduct of their business", which authority is limited by Rule 83 and 28 U.S.C. § 2071 providing that all district court rules must be consistent with the Federal Rules and Acts of Congress.

The Court of Appeals rejected this argument in the instant case. Instead, it ruled that the historical purpose of the second paragraph of the Enabling Act was not to preserve the substance of common law jury but instead "to preserve jury trials in common law cases upon the merger of law and equity". *Wilson v. Nooter, infra*, Appendix at 9a. This position taken by the Court of Appeals is plainly incorrect. If the sole purpose of this paragraph of the Enabling Act were that ascribed to it by the Court of Appeals, and if the paragraph was not intended to preserve the substance of the common law jury, the paragraph would not have been drafted as it is. Mere reference to the Seventh Amendment would have accomplished the result of preserving the right to jury trials in common law cases. However, the statute goes beyond the reference to the Seventh Amendment and requires that court rules "preserve the right of trial by jury as at common law". The Court of Appeals erred by failing to recognize that if this clause is to have any independent meaning at all, it must mean that court rules shall preserve the basic common law incidents of a jury, notwithstanding the fact that the Seventh Amendment may be subject to some other interpretation.

The Court of Appeals' conclusion that Local Rule 30 is valid was also improper for the reason that Federal Rule 83 forbids district court rules inconsistent with any of the Federal Rules promulgated by the Supreme Court. To eliminate any problem presented by Rule 83, the Court of Appeals stated that there is "nothing in Rule 30

inconsistent with Federal Rules 38(a) and 48". *Wilson v. Nooter, infra,* Appendix p. 9a. However, Federal Rule 38(a) provides that "the right of trial by jury as declared by the Seventh Amendment . . . or as given by a statute of the United States shall be preserved to the parties inviolate". Since this Court has never recognized that the Seventh Amendment can be satisfied by a six-man jury, and since the statutes defining the rule-making authority of the federal courts prohibit the creation of such juries by court rule, the Court of Appeals plain erred in finding that Local Rule 30 is consistent with Federal Rule 38(a).

Furthermore, Federal Rule 48 expressly provides that the parties "may stipulate that the jury shall consist of any number less than twelve . . . " Consequently, this rule specifically permits the parties to specify a jury of more than six but less than twelve. Local Rule 30 prohibits any such stipulation. It is, then, undeniably inconsistent with Rule 48. Since District Court rules inconsistent with any of the Federal Rules are flatly prohibited by Federal Rule 83, the Court of Appeals erred in upholding Local Rule 30.

Finally, the Court of Appeals erred because by upholding this kind of local rule it allows the federal district court, on its own motion and without prior review by Congress, to bring about a major change in federal practice which results in an unseemly lack of uniformity within the federal system. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules". *Hanna v. Plummer*, 380 U.S. 460, 472 (1965). Moreover, procedural innovations are not to be made at the local level, but instead "shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all opportunities for

comprehensive and integrated treatment which such consideration affords". *Miner v. Atlass*, 363 U.S. 641, 650 (1960). The Court of Appeals ignored these principles in allowing the size of the jury to be determined by the particular preference of the local district court. The Court's decision means that the right to a particular sized jury can vary from district to district and from time to time within the same district, depending only on local rules. This result was not intended by Congress when it passed the Enabling Act and it is inconsistent with principles previously established by this Court.

D. The Rule of *Erie Railroad Co. v. Tompkins* Requires that the Federal Courts Honor Constitutional Rights to a Twelve-Man Jury Guaranteed by the State Constitutions.

The doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), requires the federal courts in diversity cases to apply state rules of substantive law. The instant case is a diversity case in which the Erie rule applies.

If the case had been tried in the New Hampshire state courts, plainly Nooter would have been entitled to the protection of the Constitution of The State of New Hampshire which provides in Part I, Article 20 that "the parties have a right to a trial by jury and this method of procedure shall be held sacred. . . . " The New Hampshire Supreme Court has ruled that this guarantee of a jury trial in civil matters "is determined generally by the historical test of its use at common law," *Hallahan v. Riley*, 94 N.H. 338, 339, 53 A.2d 431 (1947), and that "the extent of the right to trial by jury is settled by ascertaining how it was used and practiced before 1784." *Douglas v. United States Fidelity and Guaranty Com-*

pany, 81 N.H. 371, 374, 127 A. 708 (1924). Furthermore, the New Hampshire Supreme Court has specifically held that usage at common law required a twelve-man jury.

> A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, . . . who, after hearing the parties and their evidence, and receiving the instructions of the court . . . must return their unanimous verdict . . . . *Opinion of the Justices*, 41 N.H. 550, 551 (1860), quoted with approval in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

And again:

> "A statute might be passed calling eleven men a jury, and declaring that a jury should consist of eleven men and no more, . . . but such a statute would be an infringement of the constitutional rights of trial by jury, because such a trial must be "according to the course of the common law, and the same in substance as that which was in use when the constitution was framed" . . . . *Copp v. Henniker*, 55 N.H. 179, 193 (1875).

The foregoing authorities clearly demonstrate that New Hampshire constitutional law requires a twelve-man jury in civil cases. However, despite this clear statement of New Hampshire law, the Court of Appeals rejected Nooter's argument on the six-man jury issue and held that the right to a twelve-man jury is not constitutionally guaranteed in New Hampshire. In so holding the court relied upon a recent Massachusetts decision. *Opinion of the Justices*, 1971 Mass. A.S. 1169, 271 N.E.2d 335 (1971). It disposed of the New Hampshire authorities as "ancient cases" and explained its result by stating that these cases "do not leave us convinced that New Hampshire, should the question arise today, would not

rethink the matter". *Wilson v. Nooter, infra,* Appendix p. 10a. When the Court of Appeals characterized the New Hampshire cases as "ancient", it obviously ignored *Hallahan v. Riley, supra,* decided in 1947, in which the New Hampshire Court stated that in New Hampshire the right to trial by jury "is determined by the historical test of its use at common law". Moreover, the court ignored the fact that the New Hampshire constitutional language and judicial decisions on the right to trial by jury allow much less latitude for judicial innovation than was the case in Massachusetts. Finally, the court ignored the fact that even in the comparatively fertile field of Massachusetts the decision allowing reduction in the size of the Massachusetts jury was one which split the Massachusetts Court. Consequently there is no basis whatsoever for the speculation by the Court of Appeals that the New Hampshire Supreme Court would now hold that there is no state constitutional right to a twelve-man jury. This case must, therefore, be decided on the assumption that this right does exist under New Hampshire law. *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1955).

Since the instant case presents a bona fide *Erie* problem, it is essential to consider the leading case dealing with the question of the relation of the *Erie* doctrine to the right of trial by jury. This case is *Byrd v. Blue Ridge Electrical Cooperative,* 356 U.S. 525 (1958), which presented a question regarding the status of the plaintiff as an employee under the South Carolina Workmen's Compensation Statute. Under the applicable state rule, this question was one for the judge. However, in *Byrd* the Court held that the state rule should not be followed in the federal district court, but that instead the issue should be referred to the jury. In reaching its decision the Court indicated that determining whether to

follow state or federal practice in this kind of case required a two-part analysis. See The Supreme Court, 1957 Term, 72 Harv. L. Rev. 77, 148-49 (1958). First, it was necessary to inquire whether the state practice was an "integral part" of the state created right. *Byrd, supra,* 356 U.S. at 536. Second, it was necessary to inquire whether the federal policy favoring jury decision should yield to the state rule "in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Id.* at 538.

In *Byrd* the Court found that South Carolina had never stated any reason for its rule that the judge should decide the issue of statutory employment. *Id.* at 535. This rule was not then an "integral part" of the state created right. Also, the Court found that there is a "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." *Id.* at 538. Since there was no significant state policy but a strong countervailing federal policy, and since there was no certainty that there would be a difference in outcome if the federal policy were followed instead of the state rule, the *Byrd* court held that the federal rule should prevail.

In substance, the foregoing description of the *Byrd* case shows that the *Erie* question illustrated by the case of *Wilson v. Nooter Corporation* should be resolved by balancing state and federal policies. When the respective state and federal policies are fairly considered, there can be no doubt that the Court of Appeals erred in failing to follow the state practice. Consider first the state side of the balance sheet. A twelve-man jury is a constitutional right in New Hampshire. Moreover, recent statistical studies confirm that the change to a six-man panel significantly affects the performance of the jury. See

discussion at pp. 12, *supra*. The right to a trial before a jury of twelve is then an integral part of Nooter's right to a jury trial under New Hampshire law.

On the federal side of the balance sheet, contrary to the conclusion of the Court of Appeals, the policies favoring a six-man jury are not "strong". The reasons given for the rule include the argument that it would eliminate congestion on the court docket and that the smaller jury would entail less administrative expense and inconvenience than the twelve-man jury. However, a study of the docket of the District Court for New Hampshire exposes the weakness of the first argument insofar as the New Hampshire district is concerned. The 1971 Annual Report of the Director, Administrative Office of the United States, shows that of the 217 cases on the court's docket as of June 30, 1971, 141 or 65% had been on the docket less than one year, and, of the remaining cases, 50 had been on the docket less than two years. Table C 6a, p. A22. Local Rule 30 of the Federal District Court for the District of New Hampshire did not become effective until September 1, 1971. Thus in the fiscal year prior to the effective date of Local Rule 30, there was no congestion problem making the rule in question necessary or appropriate. Furthermore, in the federal district court in New Hampshire jurors are examined on voir dire as a group by the judge. As a result, it is hard to see how reducing the size of the jury will significantly speed up trials. On the question of expense, jury expense is not a significant fraction of the national judicial budget. Zeisel, The Waning of the American Jury, 58 A.B.A.J. 367, 370 (1972). Furthermore, the Annual Report mentioned above shows there were only twelve completed civil jury trials in the New Hampshire District Court during the fiscal year 1970-71.

Table C 7, p. A26. Certainly the expense of empaneling twelve-man juries for these few trials cannot have created a serious budgeting problem requiring enactment of the rule.

Any possible argument that strongly established federal policy requires a six-man jury is completely discredited when it is remembered that such juries have only come into use in the post-*Williams* era. Prior to that decision federal judges worked with a twelve-man jury and, in fact, they still do in those federal districts which have refused to adopt local rules like the one in issue here. Moreover, the District Court in New Hampshire still uses a twelve-man jury in criminal cases. Local Rule 30(a)(2). This indicates that even the New Hampshire District Court recognizes that there is in fact a discernible difference between the performance of a six-man jury and a twelve-man jury, and it confirms that no reasonable transitional problems or frustration of federal policy would be involved if this Court should require the District Court to use a twelve-man jury in civil diversity cases. If, as the Court of Appeals suggests, it is unseemingly to have "different sized juries depending on whether . . . [a] cause of action is denominated federal or state", this problem could readily be removed by providing for twelve-man juries in all federal civil cases.

In summary, by upholding the District Court's local rule the Court of Appeals has eliminated a state constitutional right which is an integral part of the right to jury trial under New Hampshire law. The decision results in no significant saving either of federal judicial time or money, and advances no fundamental federal policy. The most that can be said for the rule is that it is a convenience for the particular district court involved. However, under New Hampshire law "mere inconvenience is not a reason for refusing a jury trial in cases where the right is

guaranteed by the constitution." *Davis v. Dyer,* 62 N.H. 231, 239 (1882), *Daley v. Kennett,* 75 N.H. 536, 540, 78 A. 123 (1910). Under these circumstances it is clear that the Court of Appeals erred when it failed to find that the local rule should yield to state policy under the principles set forth by this Court in the *Byrd* case.

CONCLUSION

For the reasons stated, it is respectfully prayed that a writ of certiorari be granted to review the March 13, 1973 Order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

MARTIN L. GROSS

Sulloway, Hollis, Godfrey
& Soden
9 Capitol Street
Concord, New Hampshire 03301

Attorneys for Nooter Corporation

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 72-1308

ALFRED WILSON, et al.,
PLAINTIFFS, APPELLEES,
v.
NOOTER CORPORATION,
DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT,
v.
THE H. K. FERGUSON COMPANY,
THIRD-PARTY DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before
ALDRICH, McENTEE and CAMPBELL
Circuit Judges.

Martin L. Gross and *John C. Ransmeier*, with whom *Sulloway, Hollis, Godfrey, & Soden*, was on brief, for appellant.
Kurt M. Swenson and *Dort Bigg*, with whom *Wiggin, Nourie, Sundeen, Pingree & Bigg* was on brief, for Alfred Wilson and Robertina Wilson, appellees.
Joseph F. Devan, with whom *Sheehan, Phinney, Bass & Green* was on brief, for The H. K. Ferguson Company, appellee.

March 13, 1973.

CAMPBELL, *Circuit Judge.* Appellee Ferguson was the general contractor for the construction of a brewery in Merrimack, New Hampshire. Appellant Nooter, a boilermaker, was the sub-contractor in charge of erecting a large vat.

Appellee Wilson, a brick mason and Ferguson employee, was injured when Ferguson's crane, operated by a Fer-

guson employee, snagged a cable holding up the scaffold upon which Wilson worked. Nooter had called in the crane to lift a heavy beam from the building which housed the vat.

Wilson and his wife sued Nooter in the district court; Nooter brought a third-party complaint against Ferguson for indemnity. Trial was before a jury of six, as required for civil cases by the district court's local rule 30. At the close of all the evidence on liability, the court directed verdicts for Wilson and his wife against Nooter, and for Ferguson against Nooter. The jury then assessed damages. Nooter has appealed.

The principal issue is whether the district court erred in withholding from the jury the question whether Ferguson's employees operating the crane had become Nooter's borrowed servants, such that Nooter was liable for their negligence, if any, as well as for any negligence on the part of its own employees. On this question, New Hampshire law applies. *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). We hold that the question should have been submitted to the jury, and accordingly remand for a new trial on liability.

Nooter, which owned cranes but had no crane at the job site, at times used a Ferguson crane, paying therefor by accepting a back charge from Ferguson. The crane operator and the oiler (who cleaned the machine and assisted the operator) were both Ferguson employees, subject to discharge and paid by Ferguson. Nooter could, however, reject an operator if not satisfied with him.

On the present occasion, Nelson, an assistant foreman for Nooter, had asked Hall, a licensed crane operator in Ferguson's employ, to bring the crane at his convenience to lift the heavy steel beam. One or two days thereafter, Hall, accompanied by his oiler, Bugay, appeared at the site in the crane, valued at $65,000, with a 100-foot boom

and a 50-ton lifting capacity. The boom could be raised or lowered and moved laterally.

The beam was lying on the third floor near the easterly side of the building. The east wall was in the process of completion, and the beam had to be removed while access remained. Wilson was working on the east wall from a scaffold suspended by vertical cables fastened to the beams of the roof of the building. The cables were hung in pairs, the cable nearer the wall supporting the inner edge of the platform, the outer cable supporting the outer edge. The pairs were spaced five to eight feet apart along the scaffold. The space between the pairs of cables was called a "bay".

Nelson pointed out to Hall where the boom had to go to make the hoist. Its tip had to be inserted through a bay. Hall decided where to place the crane, positioning it as close to the building as possible. The oiler, Bugay, directed Hall as he swung the boom down to clear the overhang of the roof. (Bugay's attention thereafter was distracted, and he did not see the events following.) Then Hall, following signals from Nelson, who was on the third floor, lowered the boom so that its tip was in the bay. Hall could not see the beam from the cab, although it could be inferred that he could see Wilson, the scaffold, and its supporting cables. About 2½ feet separated the boom from the cables on either side of it. Hall did not lock the boom to prevent sideways motion, although he could have done so.

Nelson signaled Hall to lower the hoisting cable, and, with another Nooter employee, Beatty, attached the hook on the cable to the beam. Nelson then signaled for short hoists so that the beam could be properly positioned to be lifted from the building. Finally, Nelson signaled Hall to raise the boom to lift the beam out. He gave no signal for lateral motion of the boom. As the tip of the boom came out of the bay, a protruding pin on the side of the

boom snagged one of the scaffold support cables, pulling the scaffold away from the building. Wilson, standing on the scaffold, hung onto the wall. The cable came free of the boom, the scaffold swung back, and struck and injured Wilson. The entire operation had consumed about two hours.

The district court, in directing a verdict for Wilson and for Ferguson, ruled as a matter of law that at the time of the accident, Hall and the oiler were borrowed servants of Nooter, making Nooter responsible for any negligence, in whole or in part, that may have contributed to the accident. It emphasized that "as a matter of law" they were acting under Nooter's direction and control, so that even if one or both were found wholly responsible for the accident, Nooter would still be liable.

Borrowed servant law is extraordinarily troublesome. *See generally* T. Smith, "Scope of the Business: The Borrowed Servant Problem," 38 Mich. L. Rev. 1222 (1940). In New Hampshire, the "fundamental test" for determining liability for the negligence of a general employer's servant doing work for another is "who exercised the 'right of control over the performance of that work to the extent in [sic] prescribing the manner in which it is to be executed.' " *Currier* v. *Abbott*, 104 N.H. 299, 304; 185 A. 2d 263, 267 (1962), citing Restatement of Agency 2d §§ 220(1), 227. *See also Hunter* v. *R. G. Watkins & Son, Inc.*, 110 N.H. 243, 246; 265 A. 2d 15, 17 (1970) (dictum). Right of control is determined, according both to the New Hampshire cases and to the Restatement, which they cite, as a "question of fact" (Restatement, § 227) by marshalling and weighing a variety of factors, no one of which is controlling and all of which are to be considered.

Several of the factors recognized in the New Hampshire cases, and in the Restatement, could lead a jury to conclude that the right to control remained in Ferguson. Hall

operated a machine of considerable value and complexity; where, during the job, the interests of Nooter conflicted with those of Ferguson, it might be expected that Hall would protect Ferguson's interests in the use of the machine. Hall and Bugay remained subject to discharge only by Ferguson, and only Ferguson could substitute other operators for them. The period of hire was brief. Hall decided where to place the crane, and Hall and Bugay on their own lowered the boom under the roof overhang. Hall, a licensed operator, had the skill of a specialist, making decisions such as whether to lock the boom to prevent sideways motion. *See generally Golding Keene Co.* v. *Fidelity-Phenix Fire Insurance Co.*, 96 N.H. 64, 70; 69 A. 2d 856, 860 (1949); Restatement of Agency 2d § 227, comment c.

Other, admittedly not inconsiderable, factors suggest a shift of the right to control to Nooter. Thus, Nooter's man, Nelson, told Hall where to place the boom, and directed Hall in the lifting of the beam. During the part of the job most directly connected with the accident, Hall, unable to see the beam, acted in response to Nelson's signals.[1] That Ferguson was not in the business of renting cranes but merely permitted (though not gratuitously) Nooter to use the crane would support an inference that Ferguson intended to surrender control. *See generally Currier* v. *Abbott, supra*, 104 N.H. at 303-304, 185 A.2d at 266-267; Restatement of Agency 2d § 227, comments c and d.

The balance of factors is further complicated by the rule, "There is no inference that because the general employer has permitted a division of control, he has surrendered it." Restatement of Agency 2d § 227, comment b.

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[1] It has been said, however, that a signalman's giving of signals to a winch operator "was not the giving of orders, but of information, and [that] the obedience to those signals showed cooperation rather than subordination. . . ." *The Standard Oil Co.* v. *Anderson*, 212 U.S. 215, 226 (1909).

See Cardozo, J., in *Charles* v. *Barrett*, 233 N.Y. 127, 129; 135 N.E. 199, 200 (1922).

In New Hampshire law it is for the jury to weigh the factors and decide which employer exercised the right to control. The borrowed servant question "is a question of fact... upon which the finding of the Trial Court cannot be disturbed if there is evidence to sustain it." *Indemnity Insurance Co. of North America* v. *Cannon*, 94 N.H. 319, 321; 52 A.2d 855, 856 (1947). *See also* Restatement of Agency 2d § 227, comment a. Proponents' verdicts are rarely directed in New Hampshire and in the federal courts; they are not directed, even on undisputed evidence, if the evidence gives rise to conflicting inferences. *Boothby* v. *Prescott*, 97 N.H. 504, 505, 92 A.2d 661, 662 (1952); *Federal Insurance Company* v. *Summers*, 403 F.2d 971, 975-976 (1st Cir. 1968). Here, although there is much support for the district court's conclusion, we think a jury could, by attaching different weight to certain factors, have permissibly reached a different result. Like the court in *Dickerson* v. *American Sugar Refining Co.*, 211 F.2d 200, 202 (3rd Cir. 1954), construing Pennsylvania borrowed servant law, we think that the evidence, taken as a whole, is subject to inconsistent inferences, and that, under New Hampshire law, these must be resolved by the jury.

We are aware of no New Hampshire case in which a directed verdict on this question was sustained. In *Currier* v. *Abbott, supra,* a case relied on by appellees, the court, although affirming a jury verdict holding liable the temporary employer, Abbott, said: "Upon the evidence in this case it would not be said that whatever Pratt did while hired out to Abbott 'must' as a matter of law be considered done in the service of Abbott." 104 N.H. at 303; 185 A.2d at 266.[2] *Golding Keene Co.* v. *Fidelity-Phenix Insurance*

[2] The court also said, 104 N.H. at 305, 185 A.2d at 268, "... the evidence plainly presented issues for the jury, ..." and cited *Balcus*

Co., 96 N.H. 64, 69 A. 2d 856 (1949), and *Mead* v. *The Travelers Insurance Co.*, 111 N.H. 27, 274 A.2d 792 (1971), involved affirmation of findings by a master and a trial court, respectively, and do not stand for the proposition that such findings were required as a matter of law.

Doubtless there may be a case where, notwithstanding the existence of a few factors looking the other way, the bulk of the evidence is so strong in one direction as to permit but one inference. But we cannot say this is that case. The tortuous history of "borrowed servant" reflects different emphases by different courts and commentators on the weight to be given different factors. The variety of emphases stems from conflicting judgments of policy: is it reasonable most often to impose liability upon the general employer, who hired and selected the man? Should it rather be placed upon the one whose immediate interests were being served at the time of the accident? New Hampshire, like some but not all jurisdictions,[3] has decided to leave the marshalling and weighing of the factors, and the unavoidable policy judgments lurking beneath the surface of the amorphous "control" test, to a properly instructed jury. We think we must leave them there.

Since we remand for a new trial, we shall deal briefly with two other issues raised by Nooter, finding merit in neither.

We agree with the district court that any liability of Nooter attributable solely to its "borrowed servant" responsibility for the Ferguson employees' negligence cannot be recovered back from Ferguson on a theory of implied

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v. *Sterling Express Company*, 93 N.H. 428, 43 A. 2d 155 (1945), where, on conflicting testimony as to the terms of an agreement concerning a borrowed servant, the trial court was held to have erroneously directed a verdict against the general employer.

[3] *Cf. Nepstad* v. *Lambert*, 235 Minn. 1, 50 N.W. 2d 614 (1951); *Kessler* v. *Bates & Rogers Construction Co.*, 155 Neb. 40, 50 N.W. 2d 553 (1951).

warranty of workmanlike performance. It would be odd indeed for the law, having under one of its principles shifted responsibility for their negligence to Nooter, to shift it back to Ferguson by an implication.

Nooter relies on cases that one who entrusts a non-delegable duty with respect to his premises to a third person, usually an independent contractor, and is held liable for a breach thereof, may recover from the third party for any breach of an implied obligation to perform the job with care and in a workmanlike manner. *Wentworth Hotel, Inc.* v. *F. A. Gray, Inc.*, 110 N.H. 458, 272 A.2d 583 (1970); *Sears, Roebuck & Company* v. *A. C. Philip*, — N.H. —, 294 A. 2d 211 (1972); *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 2d 567 (1938); *Ryan Stevedoring Company* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). *See* Restatement of Restitution § 95. But a necessary aspect of the cited cases is that the third-party contractor, or his employee, remains independent of the man for whom he is performing the job. Liability of Nooter for Hall's negligence, on the other hand, would rest on the finding that Hall lost his independence and, coming under the control of Nooter, became its servant.

Finally, we deal with Nooter's contention that the United States and the New Hampshire constitutions, 28 U.S.C. § 2072, and Federal Rules of Civil Procedure 38, 48 (*see* F.R.C.P. 83), all prohibit a district court's unilateral reduction in the size of the 12-man jury.

Nooter mounts this argument in the face of strong authority against it.[4] If, as the United States Supreme Court held in *Williams* v. *Florida*, 399 U.S. 78 (1970), the Sixth Amendment guarantee of jury trial in criminal cases did not freeze for all time the number of jurors at twelve, we see no reason, in history or policy, for holding that that

[4] The Supreme Court has, however, yet to rule directly. *Colgrove* v. *Battin*, *infra*, *cert. granted* 41 U.S.L.W. 3166 (1972).

number is frozen into the civil jury requirement of the Seventh Amendment. As Judge Wisdom said in *Cooley* v. *Strickland Transportation Company*, 459 F.2d 779, 781 (5th Cir. 1972), *petition for rehearing and petition for rehearing en banc denied*, "no one has ever contended that the function of the civil jury is *more* important than that of the criminal jury.... It would be anomalous to the point of irrationality to construe the Constitution as sanctioning a six-member criminal jury but not sanctioning a six-member civil jury." *Accord, Colgrove* v. *Battin*, 456 F.2d 1379 (9th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3166 (1972). We further agree with Judge Wisdom that the use of "at common law" in the Seventh Amendment merely distinguishes common law from equity and admiralty cases for purposes of the jury trial requirement, and does not imply a requirement that the jurors number 12. *See* 459 F.2d at 781-782.

Neither do we think that the enabling act, 28 U.S.C. §2072, commits the Supreme Court, in promulgating the Federal Rules, to the preservation of 12-man juries.[5] We agree with the Fifth and Ninth Circuits that this language was meant merely to preserve jury trials in common law cases upon the merger of law and equity. *See Colgrove* v. *Battin*, *supra*, 456 F.2d at 1380-1381; *Cooley* v. *Strickland Transportation Company*, 459 F.2d at 785-786. We see nothing in rule 30 inconsistent with Federal Rules 38(a) and 48. *See Colgrove*, 456 F.2d at 1381; *Cooley*, 459 F.2d at 783-785.

Alternatively, appellant argues that under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the size of the jury is a state law question, and that the New Hampshire Consti-

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[5] The act says, in part:

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

tution[8] requires a 12-man jury, citing such ancient cases as *Opinion of the Justices*, 41 N.H. 550 (1860), and *Copp* v. *Henniker*, 55 N.H. 179 (1875). These cases, it is true, refer to the view, doubtless then well-nigh universal, that juries consist of 12 men. They do not, however, focus on all the issues raised in *Williams*, and do not leave us convinced that New Hampshire, should the question arise today, would not rethink the matter. *See Opinion of the Justices*, 1971 Mass. A.S. 1169, 271 N.E. 2d 335 (1971). Thus, we do not accept the premise that a 12-man jury (as distinct from a jury) is today an "integral" part of the state-created right. *See Bird* v. *Blue Ridge Electric Cooperative, Inc.*, 356 U.S. 526, 536 (1958). Further, even the so-called outcome-determinative test would not lead to application of state law, since, as the Supreme Court said in *Williams*, 399 U.S. at 101, there is "no discernible difference between the results reached by the two different sized juries." *See Bird, supra*, 356 U.S. at 356-357, 539-540. Finally, even if outcomes might be different, we reject appellant's argument that, upon a balancing of state and federal interest, the federal policy favoring the six-member jury is not "strong." *See Bird, supra*, 356 U.S. at 537-539. Apart from the not insignificant issues of expense and inconvenience given today's crowded dockets, we think that it would appear fortuitous and arbitrary for civil litigants in the same federal court to be confronted with different sized juries depending on whether their cause of action is denominated federal or state.

There must be a new trial on the issue of Nooter's lia-

[8] "[Art.] 20th. [Jury Trial in Civil Causes.] In all controversies concerning property—and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned the parties have a right to a trial by jury and this method of procedure shall be held sacred, ..."

bility; and we remand for that purpose. If Nooter is found to be liable to the plaintiffs, the original jury verdicts on damages shall stand. Damages need not be reassessed. We intimate no position on whether, under certain circumstances, Nooter may be able to make out any claim against Ferguson for contribution or indemnity should Ferguson's employees be found not to be borrowed servants but nonetheless negligent.

Reversed and remanded for proceedings consistent herewith.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

CONSTITUTION OF NEW HAMPSHIRE

[Art.] 20th. [Jury Trial in Civil Causes.] In all controversies concerning property—and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned the parties have a right to a trial by jury and this method of procedure shall be held sacred, unless, in cases arising on the high seas and such as relates to mariners' wages the legislature shall think it necessary hereafter to alter it.

28 U.S.C. §2071

§2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

28 U.S.C. §2072

§2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or

repeal any such rules heretofore prescribed by the Supreme Court.

RULES OF FEDERAL DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Rule 30. Impaneling Trial Jury

(a) *Number of Jurors and Initial Selection*

(1) In all civil jury cases, the jury shall consist of six members and the clerk shall select by lot the names of six persons to be drawn initially.

(2) In all criminal jury cases, the jury shall consist of twelve members and the clerk shall select by lot the names of twelve persons to be drawn initially.

* * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 48. JURIES OF LESS THAN TWELVE–MAJORITY VERDICT. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Rule 83. RULES BY DISTRICT COURT. Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its

practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.